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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 691

REYNOLDS METALS COMPANY,
a corporation, *Petitioner*,

v.

PAUL MARTIN and VERLA MARTIN,
husband and wife, *Respondents*.

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

February 10, 1960, petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Oregon in the above-entitled and number cause was docketed by the clerk of this court. February 24, 1960, respondents served on petitioner their Brief in Opposition to Petition for Writ of Certiorari. Petitioner respectfully submits this Reply and Supplemental Brief in accordance with the provisions of Rule 24(4) of the Revised Rules of the Supreme Court of the United States.

I. Misstatements and Erroneous Conclusions contained in respondents' Brief in Opposition to Petition for Writ of Certiorari.

The following comments are respectfully submitted to the Court to correct several misstatements and erroneous conclusions contained in respondents' Brief in Opposition to Petition for Writ of Certiorari:

STATUTE OF LIMITATIONS

A. At page two of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that the question as to the applicable statute of limitations was never raised in the trial court, and was not an issue before the Supreme Court of the State of Oregon. This is not true.

As indicated in the Petition for Writ of Certiorari (pp. 6, 11), the Oregon statute of limitations applicable to trespass actions is six years, *1 Oregon Revised Statutes, Section 12.080, p. 76*, and that applicable to nuisance actions is two years, *1 Oregon Revised Statutes, Section 12.110, p. 76*. Thus, determination in this case of the proper basis of liability was vital. Accordingly, petitioner raised the distinction between the torts of trespass and nuisance at all stages of the proceedings herein and at every possible opportunity. That issue

was raised by motions to strike the characterization of the action as trespass, by demurrer, and by the affirmative pleading of the two year statute of limitations in the answer to the second amended and supplemental complaint. It was urged on appeal to the Supreme Court of the State of Oregon. This is all part of the record before this Court. The question of the applicable statute of limitations has, therefore, been one of the vital issues in this case from its very inception.

B. At page two of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that, even if the statute of limitations were an issue in this case, it would have been only a matter of local law, suggesting by reason of this that it is not a matter of concern to this Court.

It is true that the statute of limitations itself is a matter of local law. However, discrimination in applying the principles of law involved in determining what is the applicable statute of limitations in violation of the Fourteenth Amendment to the Constitution of the United States is not a matter of local law, but is a violation of a federal right. There has been this type of discrimination in this case by the Supreme Court of the State of Oregon, as indicated by petitioner in its Pe-

tition for Writ of Certiorari to the Supreme Court of the State of Oregon.

C. At page two of their brief, respondents contend that, inasmuch as the aluminum reduction plant continued to emit fluorides, some of which settled on respondents' lands, the statute of limitations never commenced to run.

This argument is obviously fallacious. If respondents' view of the law is accepted, application of the same in any case could lead to absurd results. Thus, if an industrial plant operated for a period of 20 years and a person claiming injuries to personal or real property became aware of the same during the first or second year, rather than having the claim barred two years later by the statute of limitations, the claim would still be alive and capable of being asserted as far as 20 years hence. This, of course, is contrary to considerations of public policy as well as the traditional attitude of the courts and legislatures in seeking to limit the time within which claims may be asserted to a reasonable period.

Furthermore, whatever may be the rule in this respect as to humans suffering personal injuries, the traditional rule as to property damage has been entirely different. A cause of action with respect to claims for

injuries allegedly arising out of the operation of an industrial plant accrues when the effluents first cause observable injury. *Sterrett v. Northport Mining & Smelting Co.* (1902) 30 Wash. 164, 70 Pac. 266; *Hill v. Empire State-Idaho Mining & Developing Co.* (CC Ida., 1908) 158 Fed. 881; *Arkebauer et al. v. Falcon Zinc Co.* (1929) 178 Ark. 943, 12 S.W. 2d 916; *Person v. City of Independence* (Mo. App., 1938) 114 S.W. 2d 175; *H. F. Wilcox Oil & Gas Co. v. Juedeman* (1940) 187 Okl. 382, 101 P. 2d 1050; *54 C.J.S., 11, Limitation of Actions, Section 109.* Where injuries are sustained from a continuing trespass or nuisance, plaintiff may recover only for such damages as have accrued during the statutory period. *Doran v. City of Seattle* (1901) 24 Wash. 182, 64 Pac. 230; *Sterrett v. Northport Mining & Smelting Co.* (1902) 30 Wash. 164, 70 Pac. 266; *Weller v. Snoqualmie Falls Lbr. Co.* (1930) 155 Wash. 526, 285 Pac. 446; *Norwood v. Eastern Oregon Land Co.* (1932) 139 Or. 25, 37; 39, 5 P. 2d 1057, 7 P. 2d 996; *Minyard v. Woodward Iron Co.* (D.C., Ala., 1948) 81 F. Supp. 414; *Parro v. Fifteen Oil Co.* (La. App., 1946) 26 So. 2d 30; *Ricou v. International Paper Co.* (D.C., La., 1953) 117 F. Supp. 128; *Stanley Development Co. v. Millburn TP* (1953) 26 N.J.S. 185, 97 A. 2d 743.

FEDERAL QUESTION

D. At page three of their Brief in Opposition to Petition for Writ of Certiorari, respondents argue

1. That

"* * * the describing of a tort committed by petitioner as a trespass rather than a nuisance does not deprive petitioner of property without due process of law."

2. That

"Affirming a proper, just and correct judgment of a trial court with the use of wrong or inapt phrases in an opinion harms no one and raises no constitutional issue."

3. And that

"Neither does an erroneous construction of an opinion in some other case between other parties deprive a person of any constitutional right."

This is not a correct statement of petitioner's position. Petitioner contends that the Supreme Court of the State of Oregon denied it equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that

1. It did not accord petitioner the benefit of common law principles of the State of Oregon regarding the distinction between the torts of trespass and nuisance, and

2. It failed to give petitioner the benefit of a new rule of law which by definition it would accord to others similarly situated.

E. At page five of their Brief in Opposition to Petition for Writ of Certiorari, respondents state that there is no constitutional protection against tort liability by industries.

Petitioner does not contend that industries should not be liable for their torts. Petitioner does contend that, in fixing industrial tort liability, a rule tantamount to strict liability should not be applied and is, in fact, discriminatory. When, as here, that has occurred, a question of great public importance is presented.

II. Supplemental Authority

After petitioner's Petition for Writ of Certiorari was docketed by the clerk of this Court, petitioner received a copy of the University of Detroit Law Journal of December, 1959, containing a comment on the decision of the Supreme Court of the State of Oregon in this case. The comment was as follows (pp. 311-315):

> **"TRESPASS—Settling on Plaintiffs' Land of Airborne Particulates from Defendant's Aluminum Reduction Plant Constitutes a Trespass.** *Martin v. Reynolds Metals Co.*, — Ore. —, 342 P.2d 790 (1959). Plaintiffs, owners of a large cattle farm, sought recovery in trespass for damage to their land and livestock caused by the settling of certain fluoride compounds in the form of gases and particulates which defendant, operator of adjoining aluminum plant, had allowed to become airborne. Defendant contended

that the cause of action was in nuisance and hence fell within the two-year statute of limitations applicable to non-trespassory injuries to land. The trial court accepted the trespass theory of plaintiffs' case and defendant appealed. *Held:* Affirmed. The settling upon plaintiffs' land of airborne fluoride compounds in the form of gases and particulates constitutes a trespass for which the defendant is strictly liable.

"There is an ever increasing reluctance on the part of courts to preserve the technical distinctions which have traditionally bound the various forms of action. While these distinctions may become unjustly nice under peculiar circumstances, nevertheless the advantages to be gained from their total abandonment must be measured against the confusion likely to attend a theory of liability too vague to define. Thus, the traditional differences between trespass and trespass on the case may be unduly academic for the modern court in many instances, but unless the legislature is equally as modern as the court in establishing statutes of limitation consistent with modern judicial definitions of the various causes of action, these differences can assume an expensive immediacy. Upon them hinged exactly two-thirds of the damages in the instant case.[1]

"Situations similar to that in the *Martin* case have generally been relegated to the law of nuisance.[2] The fact that they have been found to support an action in trespass illustrates the confusing

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"1. There is a six year limitation on trespass actions, a two year limitation on non trespassory actions.

"2. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954) (fluoride particulates); Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924); (dust and smoke); O'Neill v. San Pedro, L.A. & S.L. Ry. Co., 38 Utah 475, 114 Pac. 127 (1911) (smoke and cinders); Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922) (reduction of zinc ore)

merger which is fast taking place between the two fields.

"In spite of the exception and change to which the traditional elements of trespass have been subject, the authorities generally have continued to assume that the action will only lie where there has been an invasion of another's right to exclusive possession by a person or thing.[3] There has been no attempt, however, to limit definitively the nature of the "thing" which will constitute an entry. Where there exists a tangible substance occupying space with which the plaintiff must share possession there is little difficulty recognizing an entry. This has been the traditional concept of trespassory invasion. A major challenge to this concept appeared with the development of explosives and their use by industry. The problem is amply illustrated by a famous series of blasting cases in which the New York courts consistently distinguished damage caused by the arrival of rock upon the plaintiff's land from the equally damaging results of concussion and vibration. In the former instance the defendant was held strictly liable,[4] yet in the latter damage was *absque injuria* without proof of negligence.[5] Conscious of the injustice which such a rule produced, many other jurisdictions condemned the

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"3. Restatement, Torts, § 158 comments *b* and *h*; Prosser, Torts, § 13 2d ed. 1955); Keeton, *Trespass, Nuisance, and Strict Liability*, 59 Colum. L. Rev. 457, 468 (1959).

"4. Hay v. Cohoes Co., 2 N.Y. 159 (1849) (leading case).

"5. Benner v. Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892); Booth v. Rome, Watertown & O. T. Ry. Co., 140 N.Y. 267, 35 N.E. 592, 24 L.R.A. 105, 37 Am. St. Rep. 552 (1893) (leading case); Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901); Sullivan v. Dunham, 10 App. Div. 438, 41 N.Y. Supp. 1083 (1896). *Accord*, Campbell v. Adams, 228 Ky. 156, 14 S.W. 2d 318 (1929); Gibson v. Womack, 218 Ky. 626, 291 S.W. 1021 (1927); Hickey v. McCabe, 30 R.I. 346, 75 Atl. 404 (1910); Indian Territory Illuminating Oil Co. v. Rainwater, 140 S.W. 2d 491 (Tex. Civ. App. 1940).

distinction as one without a difference.[6] Yet the conceptual distinction upheld by the New York courts was valid according to the traditional definition of trespass. In haste to impose strict liability in either case, the majority of the courts looked to the nature of the damaging instrument and ignored the manner in which the instrument caused the damage.[7] Because the result in either case would be the same, little attention was given to the nature of defendant's conduct—whether a trespass or a nuisance. It is significant, therefore, that the court in the *Martin* case should refer to the concussion and vibration cases as precedent for the following:

> "'[W]e may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.'[8]

"The authorities state that trespass and nuisance are fundamentally separated by the interests they protect.[9] The respective realms of the two actions are not sovereign, however, even when viewed from this aspect. If vibrations,[10] or dust,[11] or particulates[12] interfere with *exclusive possession* it is only because their physical or psychological effect is such as to so

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"6. McKenna v. Pacific E. Ry. Co., 104 Cal. App. 538, 286 Pac. 699 (1904); Louden v. City of Cincinnati, 10 Ohio St. 144, 106 N.E. 970 (1914). Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913). See generally, Smith, *Liability For Damage To Land By Blasting*, 33 Harv. L. Rev. 542, 607 (1920).

"7. "The agency employed in either case is the same, and the danger as imminent in one instance as in the other." Longtin v. Persell, *supra* note 6 at 313.

"8. 342 P.2d at 794.

"9. Prosser, Torts, § 13 (2d ed. 1955); 1 Harper & James, Torts, §§ 1.2, 1.3 (1956).

"10. Cases collected in note 6 *supra*.

"11. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924).

"12. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954).

interfere with *use and enjoyment* that an owner is driven from his land. A similar confusion of the two interests is being brought out by the current air travel controversy.

"The extent of the right to exclusive possession had been determined by reference to Lord Coke's famous maxim, 'cujus est solum ejus est usque ad coelum.'[13] This presented serious consequences for the aviation industry. Anxious to save the airman from technical trespass, theories were advanced which determined extent of possession by standards based on use and enjoyment.[14] A foreshadowing of the *Martin* opinion occurs in *Hinman v. Pacific Air Transport*[15] where it was held that there can be no title to air space unconnected with the use of land and hence no trespass to air space in the absence of actual damage to present use and enjoyment. The *Restatement* has managed to remain consistent by retaining the *ad coelum* doctrine and holding that legitimate travel in space possessed by another, while ordinarily a trespass, is privileged by law.[16] The test applied in the *Martin* case is, then, but an

"13. COKE, LITTLETON, 4a. An excellent discussion of the air space controversy by Howard H. Hackley, *Trespassers In The Sky*, 21 MINN. L. REV. 773 (1937) traces the origins and history of the *ad coelum* maxim. It is there pointed out that Coke's maxim was itself first applied to nuisance cases and did not refer to extent of ownership or possession.

"14. The 'zone' theory limits a landowner's right to the extent of his 'effective possession' or that which the nature of his use may in the future require. *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930). The 'actual use' theory denies rights to all air space except that presently in use by the landowner. *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), *cert. denied*, 57 Sup. Ct. 431 (1937). The nuisance theory does not recognize ownership in air space at all, but gives a remedy in nuisance for substantial damage to present use. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

"A use and enjoyment test was used to limit extent of sub surface possession in *Boehringer v. Montalto*, 142 Misc. 560, 254 N.Y. Supp. 276 (1931).

"15. 84 F.2d 755 (9th Cir. 1936).

"16. RESTATEMENT, TORTS, § 194.

extension of the use of nuisance terminology already appearing in the law of trespass.

> "'[W]hen inquiry is made as to whether the plaintiff's interest falls within the ambit of trespass law the courts look at the interference with the plaintiff's *use and enjoyment* of his land to determine whether his interest in *exclusive possession* should be protected. . . .'[17]

"The common law requirement that an injury be direct in order to support trespass has been abandoned by the *Restatement*.[18] Many of the courts, on the other hand, have found in this requirement a valuable means of restricting what threatens to be an ever more elusive and expansive action. With an understandable reluctance to pass on the entry capabilities of dust,[19] or vibrations,[20] or cinders,[21] or particulates,[22] recovery is denied in trespass because the injury is consequential. The *Martin* opinion pays lip service to a need for direct injury,[23] an alternative, granted an interference with possession, would be an acknowledged adoption of the *Restatement* position and a holding that the intervention of wind and atmospheric conditions made the injury clearly consequential.

"Some have advocated a change in the common law presumption of damage in trespass except in the

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"17. 342 P.2d at 795.

"18. RESTATEMENT, TORTS, § 158 comment *h*.

"19. Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924).

"20. Gibson v. Womack, 218 Ky. 626, 291 S.W. 1021 (1927); Booth v. Rome, 140 N.Y. 267, 35 N.E. 592 (1893).

"21. O'Neill v. San Pedro, 38 Utah 475, 114 Pac. 127 (1911).

"22. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. S.D. 1954).

"23. 'We have held that the deposit of the particulates upon the plaintiff's land was an intrusion within the definition of trespass. That intrusion was direct.' 342 P.2d at 797.

case of intentional invasions.[24] The *Martin* opinion is not clear on this question. On the one hand there is an extended discussion as to why actual damage is not required.[25] On the other hand damage would seem to be an essential element in determining whether plaintiff has a legally protected interest in exclusive possession. The difficulty stems from the court's attempt to reconcile the *Martin* case with its holding in *Amphitheatres, Inc. v. Portland Meadows*.[26] That case was decided on a nuisance theory and recovery denied upon the principles of *de minimis* and the extra-sensitive use of land. The effect of this attempted reconciliation is to impose the *de minimis* principle upon the law of trespass and thereby leave little room for the recovery of nominal damages. After considering the entry capabilities of light rays, the court concludes that such an instrumentality could accomplish a trespass.

> "'But where the light is cast upon the plaintiff's premises in a manner which does no actual damage or causes no interference in any way with a legitimate use of the premises then there is no reason for recognizing an invasion of the plaintiff's possessory interest.[27]'

"The court refused appellant's request for a finding on the nature of its conduct—whether inten-

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"24. RESTATEMENT, TORTS, § 163; PROSSER, TORTS, § 13, 1 HARPER & JAMES, TORTS, §§ 1.3 1.4.

"25. 342 P.2d at 796.

"26. 184 Ore. 336, 198 P.2d 847 (1948). Action by operators of drive-in motion picture theatre against operators of adjoining race track for damages caused by the reflection of light from track upon plaintiff's movie screen. Plaintiff contended that the light rays constituted a trespass. 'While the line between trespass and nuisance is not always a sharp one, we think that the case at bar is governed by the law of nuisance, and not the law of trespass.' The entry capabilities of light were dismissed with the comment that 'we need not argue the distinction between a cannon ball and a ray of light.' 198 P.2d at 850.

"McAllister, C.J., concurred specially in the *Martin* case, objecting to the attempt to reconcile that case with the *Amphitheatres* case.

"27. 342 P.2d at 795.

tional, negligent, or free of fault—contenting itself with a statement that defendant had committed a trespass and would, therefore, be strictly liable.[28] Implicit in such a finding is the modern philosophy that the high profits of industry should indemnify innocent property owners against loss occasioned by the unavoidable consequences of operation.[29] The proper vehicle for such a philosophy would seem, however, to be nuisance where there can be a more orthodox weighing of the social value to be gained from defendant's conduct against the need to protect plaintiff in the free and complete enjoyment of his land. Certainly novel causes of action are bound to arise when strict liability is uniformly applied to an action as broad as that outlined in the instant case. As the law is here set forth every private nuisance which produces a physical effect on plaintiff's land will also constitute a trespass.

"T. Patrick Durkin"

"28. 342 P.2d at 797.

"29. 1 Harper & James, Torts § 1.24 (1956)."

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of the State of Oregon is based upon a denial to petitioner of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In their brief, respondents have failed to deal with the issue thus presented. In fact, respondents nowhere even mention this portion of the Constitution.

For the reasons suggested in its petition for Writ of Certiorari to the Supreme Court of the State of Oregon, and for the reasons set forth herein, petitioner respectfully prays that its Petition for Writ of Certiorari to the Supreme Court of the State of Oregon be granted.

Respectfully submitted,

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